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Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

No. 90-1893

In The

Supreme Court of the United States

October Term, 1991

MICHAEL HIRSH,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner previously brought the subject action before this Court in a Motion for Stay, pending a decision by the Georgia Supreme Court, which was subsequently denied by this Court. *Hirsh v. City of Atlanta*, ___ U.S. ___, 110 S.Ct. 2163, 109 L.Ed.2d 493 (1990). Since the denial of the stay by United States Supreme Court, the Georgia Supreme Court has upheld the subject injunction with one modification, so that its effect is to significantly narrow the application of the injunction as originally granted by the Superior Court. While the original injunction created a fifty foot free zone adjacent to medical clinics performing abortions within the City of Atlanta, the injunction as interpreted by the Georgia Supreme Court now permits protest activities within fifty feet of abortion clinics, but keeps in effect the other time, place and manner restrictions which were part of the injunction as originally granted by the Superior Court. In particular, the injunction prohibits Defendants from trespassing onto abortion clinic property, impeding ingress and egress into a clinic, or physically harassing or assaulting persons entering clinics. Additionally, the injunction as upheld by the Georgia Supreme Court allows First Amendment activities within fifty feet of clinics with a limit of twenty protesters at a time, and permits a person to engage in sidewalk counselling or oral protest with a second person within fifty feet of a clinic or parking lot used by the clinic as long as such person does not approach closer than five feet to the second person without first receiving that person's permission. Additionally, the injunction prohibits signs which would induce honking by passersby of clinics, and requires the named Defendants and

those acting in concert with them to inform others working with them of the subject injunction and that they are not permitted to engage in activities enjoined by the order. (J.A. 24a through 28a). No restrictions are imposed beyond the above referenced 50 foot boundaries.

Respondent shows that the subject injunction is consistent with the U.S. Constitution and that there is no basis for this Court to grant Certiorari.

STATEMENT OF THE CASE

The City of Atlanta filed a complaint in the Fulton County Superior Court, seeking an injunction, pursuant to a resolution of the Atlanta City Council adopted on September 19, 1988 and approved by the Mayor on September 27, 1988. (T. 321).[1] Said resolution was adopted by the City Council as a result of a pattern of disruptive and unlawful activities conducted by a group of individuals and organizations seeking to prevent abortions and known collectively as "Operation Rescue". The activities of Operation Rescue included physically blocking patients' and staff members' access to abortion clinics and family planning facilities operating within the City of Atlanta, harassing the patients and staff members, trespassing upon clinic property and otherwise engaging in activities not protected by the First Amendment to the United States Constitution. The resolution declared the

[1] The abbreviation "T" used throughout this brief refers to the transcript of the trial in the Superior Court on March 22, 1990.

actions undertaken by Operation Rescue to constitute a public nuisance endangering the health, safety and welfare of the City of Atlanta and its citizens. (T. 322-324).

The disruptive activities of Operation Rescue, and other Defendants, including petitioner, commenced in the City of Atlanta in July, 1988, around the time of the Democratic National Convention. (T. 37, 104). From that time until the date the Amended Order was entered, (J. A. 29a),[2] Operation Rescue almost continuously blocked entrances to abortion clinics, trespassed into and upon said facilities, and engaged in other disruptive activities at clinics located within the City of Atlanta. (T. 37, 38, 127). Operation Rescue's method of disruptive behavior is as follows:

> Upon arrival they would solidify a group of people that they had come in groups of, sometimes as little as thirty, other times as many as two hundred. They would target a specific clinic in particular, or on some occasions, more than one clinic. They would arrive at that location, immediately go straight to the property, go straight to the doors, accesses, attempt by sitting down, laying down, locking of arms to block all entrances and exists to and from the clinic where they were present at. (T. 38, Testimony of Lieutenant Carl Pyrdum).

In addition, Operation Rescue's activities included yelling abusive language at clinic patients and employees, swarming persons in cars entering clinics, creating noise levels so loud as to disturb patients inside

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[2] The abbreviation "J. A." used throughout this brief refers to the joint appendix attached to brief of Petitioner.

the clinics including those involved in medical procedures at the time. (T. 38, 116, 117). As a result of Operation Rescue's and the other Defendants' tactics, abortion facilities have been forced to provide escorts to assist patients and their families in gaining access to the facilities. The escorts also had to shield the patients from the surrounding protesters by the use of umbrellas. (T. 114). The tactics of Operation Rescue and the other Defendants have caused patients to reschedule appointments, patients have been prevented from entering into the building for medical procedures, and at other times have been trapped inside the clinic. Defendants further caused physicians to be locked out of the clinics, and emergency entrances to be blocked. Overall these actions resulted in great distress for patients, family, and staff members. The Defendants' actions have also resulted in placing patients at a greater health risk, such as causing patients' pulse rates and blood pressure to rise before medical procedures, and caused the delay of medical procedures. (T. 111-112, 115-117). Evidence at trial also showed that the activities of Operation Rescue and other Defendants have cost the City of Atlanta a substantial amount of money including overtime pay for police, correction and court personnel as well as substantial costs for housing the Defendants when arrested following their criminal activities and other administrative costs. (T. 93-95). The minimum cost to the City of Atlanta associated with housing the Defendants and others associated with Operation Rescue constituting 1274 arrests was estimated to be approximately $272,076.00. Because many protesters refused to give correct names during the booking process the average stay of each protester in jail

increased to 5.21 days which added to the City's costs. (T. 93-94).

Petitioner Michael Hirsh has been a director of Operation Rescue and has regularly participated in disruptive activities at abortion clinics within the City of Atlanta since the Democratic Convention. (T. 47, 122, 124, 127, 143, 144).

Additionally, facts supporting the imposition of the subject injunction are amply set out by the Georgia Supreme Court in its decision. (J.A. 2a to 5a). After a bench trial, the trial court issued its Findings of Fact and Conclusions of Law on March 28, 1990, and the Court's Amended Order, issued the next day set in place the injunction subsequently modified by the Georgia Supreme Court from which the Petitioner now appeals. The Georgia Supreme Court upheld the injunction, with a modification, in a decision rendered on March 15, 1990.[3]

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[3] This brief will address the arguments raised by Petitioner Hirsh. Paragraph three of the injunction by its terms imposed a prohibition on all "demonstrations, pickets or protests" within fifty feet of the property line of any abortion business. (J. A. 30a). The Supreme Court of Georgia, however, construed the injunction to allow up to twenty demonstrators, picketers, or protestors within fifty feet of the property line of any abortion business. (J. A. 6a-7a). The court essentially subordinated the provisions of paragraph three to the less restrictive provisions of paragraph seven of the injunction. *Id.* ("In order to meet the requirement that the restrictions be narrowly tailored, the ban in paragraph 3. . . . must be read in conjunction with paragraph seven. . . . "). In effect, the court deleted paragraph three entirely, and modified paragraph seven by replacing the phrase "in the vicinity" with "within 50 feet of any property line".

Petitioner previously filed an application for stay of the subject injunction to the U.S. Supreme Court, which was subsequently denied by this Court. *Hirsh v. City of Atlanta*, ___ U.S. ___, 110 S.Ct. 2163, 109 L.Ed.2d 493 (1990). (J.A. 35a).

ARGUMENT AND CITATION OF AUTHORITY

I. THE DECISION OF THE SUPREME COURT OF GEORGIA IS CONSISTENT WITH DECISIONS OF OTHER STATE COURTS

Petitioner has asserted that there is division among the states as to whether "otherwise lawful expressive activities in public places" may be enjoined. While Petitioner seeks to assert a distinct difference exists among the state courts, none of the state court decisions cited by petitioner have rejected the time, place, and manner analysis established by this Court, and the state court cases cited by Petitioner have consistently upheld injunctions, in some instances modified in part, applying to protesters' activities at or near medical facilities in which abortions are performed.

Petitioner has cited *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 550 N.E. 2d 1361 (1990), a case in which the Massachusetts Supreme Court upheld a preliminary injunction which prohibited among other things the trespassing, blocking, or obstructing access to persons using the clinics of Plaintiff. Note 5, 406 Mass at 705, 550 N.E.2d at 1364. While the preliminary injunction in that case did not create a zone

restricting protestors activities as does the subject injunction, the Court was not asserting that such a zone could not pass constitutional muster. The Court was merely asserting that the injunction being considered before it merely enjoined Plaintiffs from engaging in illegal activities. The Court further noted that the injunction did not prohibit expressive activity "which does not unduly interfere with the rights of others". 406 Mass. at 715, 550 N.E. 2d at 1370. On the contrary, the Court asserted that the injunction before it did not constitute a prior restraint and that governments may impose reasonable time, place, and manner restrictions regulating conduct which justifies incidental limitations on First Amendment rights, and referenced *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989) in support of said proposition.

Petitioner also has cited *O.B.G.Y.N. v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D. 2d 894, 407 N.Y.S.2d 903 (1978) in support of the proposition that there is a dichotomy among the states as to whether "otherwise lawful" expressive activity in public places may be limited, and references a quote in said case that restraints should be limited only to activities that are not protected under the First and Fourteenth Amendments to the United States Constitution. However, Petitioner omitted the next sentence of *O.B.G.Y.N. Associates*, 407 N.Y.S.2d at 905, which states:

> While the cases have declared that Defendants' expressive activities i.e., picketing and pamphleteering, are protected under the First and Fourteenth Amendments, the "cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests,

> and are permitted." (Citing *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S. Ct. 2294, 2303, 33 L. Ed 2d 222).

Additionally, contrary to Petitioner's implication, the injunction in *O.B.G.Y.N. Associates* contained restrictions on arguably "otherwise lawful" expressive activities which were upheld by the Court including a free zone which prohibited Defendants from parking their vehicles within 100 yards of the subject medical clinics even though the vehicles had been used to post placards. Additionally, the injunction upheld in that case prohibited "excessively loud noise which disturbs, injures or endangers the health and safety of patients" of the medical clinic. Presumably noise that "disturbs" patients may not otherwise be illegal activity in New York State, but the court found said prohibition to be constitutionaliy valid, in that that type activity was found to be incompatible with the normal activity of a particular place at a particular time and once again referenced *Grayned, supra,* for its holding. 407 N.Y.S.2d at 905, 906.

Also cited by Petitioner is a subsequent New York State case of *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D. 2d 551, 457 N.Y.S.2d 27 (1982). While the Court in *Parkmed* modified an injunction in part by deleting a provision which it deemed overbroad which prohibited "demonstrating, picketing, and any way interfering with activities on the plaza area or steps". The Court held that a sufficiently clear standard was needed so as to put parties on notice as to what constituted lawful versus restrained conduct. However the *Parkmed* court once again affirmed the ability of governments to establish

reasonable time, place and manner restrictions on activities subject to the First Amendment. 457 N.Y.S.2d at 29, 91 A.D. 2d at 552. The Georgia Supreme Court decision in the subject case is consistent with the holding in *Parkmed* in that the Georgia Supreme Court has upheld an injunction with clear guidelines as to the specific activities which are enjoined, yet preserving ample alternative means of communications.

Additionally, petitioner has cited several cases which petitioner has conceded have upheld specific restrictions on the number and location of protesters outside of medical facilities where abortions are performed. Several of the cases cited by Petitioner have upheld restrictions which are arguably more stringent than those upheld by the Georgia Supreme Court in the subject action. In particular, in *Bering v. SHARE*, 106 Wash. 2d 212, 721 P. 2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, 107 S. Ct. 940, 93 L.Ed. 990 (1987), the Supreme Court of Washington upheld an injunction imposing time, place and manner restrictions which among other things confined picketing, demonstrating, or "counseling" to a public sidewalk area on one side of the medical facilities' main entrance.

And in *Planned Parenthood Association of Cincinnati v. Project Jerico*, 52 Ohio St. 3d 56, 556 N.E. 2d 157, *reh'g denied*, 53 Ohio St. 3d 706, 558 N.E. 2d 61 (1990), the Court upheld an injunction limiting the total number of stationary picketers to two persons and to three moving picketers in an area outside the medical clinic. The subject injunction as modified by the Georgia Supreme Court is arguably much less restrictive than injunctions upheld in *Planned Parenthood Association of Cincinnati* and *Bering*. The subject injunction allows up to 20 demonstrators

within a 50 foot area and imposes no restrictions beyond the 50 foot area, allowing for ample alternative means of communication; it must be considered a reasonable content neutral time, place and manner restriction consistent with court decisions of other states.

II. THE DECISION IS CONSISTENT WITH THE DECISION OF THIS COURT AND THE FEDERAL COURTS OF APPEALS

A. AN INJUNCTION MAY PROPERLY CONTAIN A TIME, PLACE AND MANNER ANALYSIS

Petitioner Hirsh has attempted to assert that only "unlawful" activities may be restricted by courts when providing injunctive relief to a party which has been repeatedly subjected to a pattern of disruptive, harassing, and at times unlawful acts by third parties. Said assertion ignores a whole line of cases upholding content neutral, reasonable time, place, and manner restrictions on otherwise "lawful" first amendment activities.

Reasonable time, place and manner restrictions almost identical to those in the subject petition have been upheld by other courts across the nation. See, *N.Y. State National Organization for Women v. Terry*, 886 F.2d 1339 (2nd Cir. 1989), *cert. denied*, ___ U.S. ___ 110 S. Ct. 2206, 109 L.Ed.2d 532 (1990); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F. 2d 681 (9th Cir. 1988). While the U.S. Supreme Court has consistently recognized that the First Amendment reflects "a profound national commitment" to the principle that "debate on public issues should be uninhibited, robust and wide open", *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1162, 99

L.Ed. 2d 333 (1988), it is also recognized that "the First Amendment may not be read to protect a person's right to express their (sic) views at any time, in any manner, and in any place of their choosing". *Terry*, 886 F.2d at 1363. (See also, *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 102 S. Ct. 2559, 2563-64, 69 L.Ed. 2d 298 (1981)). The *Terry* case is important not only for its holding allowing an injunction under the First Amendment, but because its facts are similar to those in the instant case, and because some of the same Defendants were involved in both that case and this one. In *Terry*, contrary to the contention at page 11 of Petitioner's brief, the Court not only regulated "unlawful activities" of Defendant Operation Rescue and others, such as trespassing and blocking ingress and egress into the medical clinics, but also imposed restrictions on arguably otherwise "lawful" activities such as "obstructing" ingress and egress, and restricted "sidewalk counselling" to not more than two people. 886 F.2d at 1363.

As noted by the U.S. Court of Appeals for the Second Circuit in the *Terry* case:

> Operation Rescue's activities are subject to reasonable time, place and manner restrictions so long as the limitations are (1) content-neutral, (2) narrowly tailored to meet a significant governmental interest, and (3) leave open ample alternative means of communication." 886 F.2d at 1363 (2nd Cir. 1989). See also, *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3068-69 (1984).

Where, as here, a regulation is content neutral, the reasonableness of the regulation depends upon "the nature of a place and the pattern of its normal activities",

Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972).

In citing *Grayned*, the U.S. Court of Appeals for the Ninth Circuit concluded:

> We have no doubt that the interests that render reasonable the regulation of disruptive expression outside schools and courthouses also operate to allow regulation of disruptive expression outside a clinic where medical services including surgery are offered. *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988).

The U.S. Court of Appeals for the 2nd Circuit in *Terry* further stated:

> As we view it the order regulates the time, place and manner of expression in a way that neutrally balances the rights of Operation Rescue to express its views, of women to enter the clinics unhindered by an invasion of their rights, and of the clinics to provide necessary medical services. *Terry*, 886 F.2d at 1363 (2nd Cir. 1989).

Petitioner has cited several U.S. Court of Appeals decisions which Petitioner asserts are contrary to the decision of the Supreme Court of Georgia in the subject action. However, in actuality, the cases cited by Petitioner do not support granting of certiorari in the subject action. In particular, Petitioner has cited *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), in which the Fifth Circuit upheld the denial of a preliminary injunction sought against anti-abortion protestors by a medical clinic. In *McMillan*, the Plaintiff clinic had sought a five hundred foot "free zone" in which protest activities would be prohibited, including a prohibition on the use

of certain words by protestors such as "kill", "murder", and "butcher". The injunction sought in *McMillan* is distinguishable from the subject action in that the subject action contains a much more narrowly tailored injunction, with no "free zone" in which Defendants' activities are prohibited. The instant injunction *permits* Defendants to be located within a 50 feet zone based on compliance with other provisions of the injunction. Furthermore the injunction sought in *McMillan* was arguably content based in that it would have prohibited use of certain words. The subject injunction does not restrict the language which may be used by Petitioner or other Defendants and is content neutral, and unlike *McMillan*, the trial court in the subject action has found that sufficient evidence existed to warrant granting an injunction.

In *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *cert. granted on other grounds sub nom., Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991) cited by Petitioner, the Fourth Circuit Court of Appeals upheld the injunction granted by the trial court at 724 F.Supp. 1483 restricting protest activities adjacent to abortion clinics, but deferred to the trial court in declining to expand the injunction as sought in a cross appeal by Appellees to include a prohibition on activities which would "intimidate, harass or disturb patients". There is no indication that the Plaintiffs in that case sought at trial to obtain the type of time, place, and manner relief obtained in the subject action which includes a specified 50 foot zone in which activities of named Defendants and those acting in concert with them are limited, and other similar relief. Furthermore, the

appellate court in *National Organization* stated it would defer to the trial court, absent a finding of an abuse of discretion. The holding in *National Organization* does not evidence a division among the various U.S. Court of Appeals circuits which Petitioner attempts to assert exists.

The type relief provided in the subject injunction is consistent with time, place and manner restrictions that have been upheld by the U.S. Supreme Court and other federal appellate court decisions. In *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), the U.S. Supreme Court upheld a statute limiting the congregating of three or more persons within 50 feet of embassies when deemed to be a threat to the security or peace of an embassy. 108 S.Ct. at 1168. The subject injunction is much more narrowly tailored in that it extends only 50 feet rather than the 500 feet restriction upheld in *Boos*. More importantly, the subject injunction allows for twenty demonstrators within 50 feet of a medical facility, as opposed to *Boos* where the Court upheld a restriction of congregations of three or more persons. In addition, the subject injunction as imposed is in response to a history of noisy, abusive, and disruptive tactics by Petitioner, Operation Rescue and others acting in concert with them and other Defendants, and is a narrowly tailored response to said Defendants' past history and ongoing actions.

And in *Concerned Jewish Youth v. McGuire*, 621 F.2d 471 (2nd Cir. 1980), *cert. den.* 450 U.S. 913, 101 S.Ct. 1352 (1981), the U.S. Court of Appeals held that a restriction to twelve demonstrators to be confined to a bull pen within sight of the intended audience, the Soviet Mission, was constitutionally valid. The Court upheld this limit due in

part to the special nature of the building in question and referenced other locations where zones limiting free speech have been upheld as reasonable time, place, or manner restrictions, including jails, schools, and courthouses. Similarly, medical facilities where surgical procedures are performed are entitled to protection from excessive disturbance; thus restrictions on the number of protesters in the vicinity of such facilities is constitutionally valid.

Petitioner has cited *White House Vigil v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984) in support of the proposition that courts lack expertise to draft time, place, and manner restrictions. However, in *Clark* the Court of Appeals reversed a District Court ruling that modified most of the regulations established by the U.S. Park Service regarding demonstrations outside the White House. The Court of Appeals held that the U.S. Park Service regulations were reasonable time, place, and manner restrictions and that the trial court's role was either "to uphold regulations which are constitutional and to strike down those which are not". 746 F.2d at 1529. The Court of Appeals was merely stating what the court's role was in evaluating a regulation; the Court of Appeals, contrary to Petitioner's implication, was not stating that injunctive relief was unavailable in fashioning a time, place, and manner remedy for harmed parties. The D. C. Court of Appeals in *Clark*, by upholding such time, place, and manner restrictions as restricting the size and material of signs, requiring all signs to be attended, and restricting the placement of signs, provides legal precedent for upholding the subject time, place, and manner restrictions.

Petitioner cites *Grayned, supra,* and other cases for the proposition that a time, place, and manner analysis is limited only to statutes, ordinances, and regulations; this argument however, is completely without merit. While *Grayned* and other cases cited by Petitioner involved ordinances or regulations, they do not support Petitioner's conclusion that a time, place, and manner analysis is inapplicable to injunctions. In fact, in *Portland Feminist Women's Health Center,* 859 F.2d at 686 (9th Cir. 1988), the appellate court held that the time, place, and manner analysis of *Grayned* is applicable to appellate review of an injunction limiting protest activities adjacent to abortion clinics and other medical facilities. That Court held:

> The reasonableness of a time, place and manner restriction depends heavily upon "[t]he nature of a place, 'the pattern of its normal activities . . . . ' The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned,* 408 U.S. at 116, 92 S.Ct. at 2303. The Supreme Court has applied this principle to sustain regulation of disruptive speech in front of schools, *Grayned,* 408 at 121, 92 S. Ct. at 2306, and near a courthouse, *Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). We have no doubt that the interests that render reasonable the regulation of disruptive expression outside schools and courthouses also operate to allow regulation of disruptive expression outside a clinic where medical services including surgery are offered. 859 F.2d at 686.

Thus a time, place, and manner analysis can and should be made in regard to the subject injunction.

Petitioner places great reliance upon a footnote in *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 924, 102 S.Ct. 3409, 3431, 73 L.Ed.2d 1215, n. 67 (1982) for the proposition that only unlawful activities, not "protected speech" may be enjoined. However, *NAACP* concerned a Mississippi State Court decision totally enjoining a black led boycott of white businesses, unlike the present injunction merely imposing reasonable time, place, and manner restrictions as to the manner in which arguably first amendment protected activities may occur. Clearly, the Court in *NAACP* was not rejecting a time, place, and manner analysis in regard to injunctions. Justice Stevens (author of the opinion in *NAACP*) recognized this in his concurrence denying Petitioner's application for a stay in the subject action, distinguishing the subject injunction from the injunction ultimately struck down by the Court in *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed. 96 (1977). Justice Stevens wrote in this very case that "(i)t is entirely proper, however, to draw a distinction between injunctive relief imposing time, place, and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct, on the one hand, . . . , and an injunction that constitutes a naked prior restraint against a proposed march by a group that did not have a similar history of illegal conduct in the jurisdiction where the march was scheduled". *Hirsh v. City of Atlanta*, ___ U.S. ___, 110 S.Ct. 2163, 109 L.Ed.2d 493 (1990). (cites omitted).

Therefore, even though the unlawful conduct of Petitioner may be restrained, other activities subject to the First Amendment are nevertheless subject to reasonable

time, place or manner restrictions, and Petitioner's Petition for Writ of Certiorari should accordingly be denied.

B. THE INJUNCTION IS CONTENT NEUTRAL

It has been consistently held that an injunction in order to pass constitutional muster must be content neutral. The primary concern of content neutrality is that no speech or expression of a "particular content" is "singled out" by the government for better or worse treatment. *Terry*, 886 F.2d at 1363, citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 98 L.Ed.2d 346 (1976). Petitioner Hirsh has asserted that the subject injunction regulates speech based on content. However, the challenged portions of the subject injunction makes no reference whatsoever to the content of any speech, nor does it exempt picketing or demonstrating for reasons other than opposing abortion. But the injunction does prohibit certain activities, regardless of content, in areas adjacent to abortion facilities.

Furthermore, the injunction (J. A. 29a) is entirely consistent with Rule 65(d) of the Georgia Civil Practice Act, O.C.G.A. § 9-11-65(d), which requires that an injunction "shall be specific in terms; . . . . shall describe in reasonable detail. . . . the act or acts sought to be restrained. . . . and is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them. . . . ". Said rule is substantially

identical to Rule 65(d) of the Federal Rules of Civil Procedures. The subject injunction is focused, as the injunction in the Portland case was, "exclusively on the location and manner of expression", see *Portland Feminist Women's Health Center*, 859 F.2d at 686 (9th Cir. 1988). It is applicable uniformly irrespective of the subject matter which is desired to be communicated.

While Petitioner asserts that the subject injunction only applies to "anti-abortion" speech, this assertion is without foundation. On the contrary, the challenged portions of the injunction makes no reference whatsoever to speech content but merely constitutes time, place, and manner regulations regarding Defendants' activities and those acting in concert with them. Thus Petitioner has completely misread the meaning and the intent of the plain language of the injunction.

C. THE "BUBBLE ZONE" PROVISION IS NOT UNCONSTITUTIONAL

Petitioner Hirsh at pages 24 through 28 of his brief again misreads the terms of the injunction. The injunction creates a five-foot "bubble" of personal space applicable within fifty feet of medical clinic property lines or within a radius of fifty feet of parking lots used by clinic staff and patients in which one person may not intentionally invade without the express permission, the five-foot "bubble" of another person.

The purpose of this provision is to allow free access to and from the clinics covered by the injunction, while accommodating the Petitioners' First Amendment rights.

Again the context in which this injunction was entered must be remembered. The evidence in this case shows that the Petitioner and others, often in crowds of hundreds of people, gathered at entrances to clinics. When a patient arrived, all of these persons immediately turned and focused all of their attention on the patient, her family and friends, swarming around the car in which the patient was riding, screaming and yelling abusive epithets, banging on the car, and pressing up against the car doors and windows. When the patients and their families attempted to simply walk into the clinic entrances, they were swarmed about, bumped, pushed, shoved and jostled as they attempted to make their way. Moreover, their ways have been physically blocked by huge crowds of people, pushing up against them and yelling in close proximity to their faces while screaming things like "don't kill your baby" and similar outbursts intended to frighten and turn away patients, their families and friends. (T. 115-116).

The purpose of the bubble zone is to provide free unfettered ingress and egress to and from the clinics which is a constitutionally protected right in itself.

The language in this portion of the injunction is also clear and unmistakable in its terms. It is constitutionally content neutral as required by case law. A cursory reading of the injunction reveals that it does *not* "single out for discriminatory treatment only those who try to deliver a pro-life message to potential patrons of abortion facilities." (R. 248).

"Bubble zone" provisions in the vicinity of medical facilities, such as in this case, have been upheld by

various courts. In a scholarly discourse on this subject, a recent law review article argues that "bubble protection like that provided by Boulder's Bubble Zone Ordinance is an appropriate and permissible means of balancing the rights of speakers against the privacy interests of certain unwilling listeners." Note, "Too Close For Comfort: Protesting Outside Medical Facilities", 101 *Harvard Law Review* 1856 *et seq.*

As noted by the law review article, "when speakers' interests conflict with those of unwilling listeners, the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate". *Rowan v. United States Post Office*, 397 U.S. 728, 736, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970). Justice Brandeis once described "the right to be let alone" as "the most comprehensive of rights and most valued by civilized men". *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928). (Brandeis, dissenting). Although courts generally strike this balance in favor of speakers, see *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-211, 95 S.Ct. 2268, 2273, 45 L.Ed.2d 125 (1975), they are quite willing to protect listeners when "substantial privacy interests are invaded in an essentially intolerable manner". *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971). As noted by the law review author, "in recent years listeners' privacy interests have come into sharp conflict with the speakers' interests outside abortion clinics", where "protesters have chased patients outside abortion clinics, waved dismembered dolls splattered with red paint, screamed epithets and threats at both patients and staff, sometimes forcing proximity on listeners to enhance the dramatic impact of their

speech" in extremely aggressive ways. 101 *Harvard Law Review* at 1856.

The courts have permitted states to protect listeners who can not easily escape bombardment by unwanted speech. See *Lehman v. City of Shake Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1973) (protecting listeners inside public buses from political advertising); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (protecting listeners in and outside their homes from loud and raucous noise); *International Society for Krishna Consciousness, Inc. v. Rockford*, 585 F.2d 263 (7th Cir. 1978) (protecting passengers in line at Airport ticket counters from religious solicitation).

As the Georgia Supreme Court noted in the subject case, *Hirsh, supra*, "the 5-foot 'bubble zone' is an appropriate and permissible means for the trial court to use in balancing the protestors' freedom of expression with the patients' rights of access to chosen medical care and to privacy." (J.A. 8A). As the Court noted, the "bubble zone" "affords a clinic patient, physician, or employee the ability to exit a vehicle and approach the site of medical care without being swarmed, jostled, and yelled at from close range by the protesters." (J.A. 7A). Accordingly the subject "bubble zone" is a reasonable time, place or manner restriction and does not provide a basis for petitioner to be granted certiorari by the U.S. Supreme Court in the subject action.

D. THE PROVISIONS OF THE INJUNCTION ARE NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD

In response to Petitioners' assertion at pages 27 and 28 of his brief it must be remembered that we are dealing

here with an injunction and not a statute or ordinance. Therefore only the courts may interpret its meaning and enforce its provisions. In the Portland case, the enjoined defendants challenged the injunction for overbroadness and vagueness, however the Court of Appeals held that:

> The vagueness doctrine is based on due process principles that require fair notice and warning. (Cites omitted). It also incorporates a requirement that specificity be sufficient to avoid arbitrary and discriminatory enforcement. (Citations omitted). The doctrine's goal is to avoid allowing policemen, prosecutors and juries to pursue their personal predilections by requiring legislators to promulgate specific standards in criminal statutes. (Citations omitted). These concerns arise in a different context here where enforcement lies entirely in judicial hands. So viewed the injunction is not unconstitutionally vague for reasons that we have already set forth. *Portland Feminist Women's Health Center,* 859 F.2d at 687 (9th Cir. 1988).

It has also been held that Rule 65(d) of the Federal Rules of Civil Procedure, (which is substantially identical to O.C.G.A. § 9-11-65) requires that injunctive orders be "specific in terms" and "describe in reasonable detail the act or acts sought to be restrained." The rule is intended to prevent an uncertain or vague decree from becoming the basis for a contempt citation. See, *Schmidt v. Lessard,* 414 U.S. 473, 476, 94 S.Ct. 713, 715, 38 L.Ed.2d 661 (1974).

"Injuctions are not set aside under Rule 65(d) . . . unless they are so vague that they have no reasonably specific meaning". *United States v. Holtzman,* 762 F.2d 720, 726 (9th Cir. 1985).

To comply with the specificity and clarity requirements, an injunction must "be specific and definite enough to apprise those within its scope of the conduct that is being proscribed." *In re Baldwin – United Corp.*, 770 F.2d 328, 339 (2nd Cir. 1985).

Injunctions similar to the one in the instant case were upheld in both the *Terry* and *Portland* cases, in the face of challenges based on vagueness and overbreadth. *New York State NOW v. Terry*, 886 F.2d 1339 (2nd Cir. 1989) *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990); *Portland Feminist Women Health Center*, 859 F.2d 681 (9th Cir. 1988).

Here, as in those cases, the conduct that lay between that which was prohibited and that which was permitted was sufficiently clear for defendants to ascertain precisely what they could and could not do. *Terry*, 886 F.2d at 1352.

E. THE INJUNCTION PROPERLY REQUIRES PERSONS SUBJECT TO IT TO INSTRUCT OTHERS TO COMPLY THEREWITH

Paragraph 10 of the injunction simply requires the Petitioner and others subject to the injunction to instruct others to comply with the order, and is clearly not unconstitutional. (J.A. 32a). Although Petitioner Hirsh speculates on theoretical applications which might be used regarding this provision, it must again be remembered that the enforcement of this order "rests entirely in judicial hands" and only the judiciary can interpret its meaning and apply its provisions. In *Portland Feminist Women's*

Health Center, supra, at 687, the enjoined parties complained that the terms of the injunction were unconstitutionally vague and subject to interpretation by the plaintiffs, but the Court of Appeals disagreed, noting that only the court could interpret its order and enforce it.

Likewise, the order is not unconstitutional because it demands compliance with its terms and demands that Petitioner and others subject to it to instruct their co-defendants to comply with its terms. The order can not be read to require anyone to speak against his conscience or to ask anyone to support abortions, the U.S. Supreme Court, or a right of privacy of others. The order forbids certain conduct but leaves all of the defendants, including Petitioner, free to communicate ideas and disseminate their views ad nauseam on these publicly debated topics. All that is required is that the Petitioner and others subject to the injunction instruct their co-defendants of a lawful court order and that they are bound to obey it. Thus, this case is readily distinguishable from those in which a citizen was required, for example, to salute a flag in contravention of his religious beliefs, or to affix an auto tag to his vehicle reading "live free or die".

Paragraph 10 is a legitimate enforcement tool and was properly included in the injunction.

CONCLUSION

For the foregoing reasons, Petitioner is not entitled to a grant of certiorari of the judgment of the Supreme Court of Georgia in the case at bar.

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Date: July 12, 1991.

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